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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE JAMES WARE

FACEBOOK, INC.,)	
)	
Plaintiff,)	
)	
VS.)	No. C 08-5780 JW
)	
POWER VENTURES, INC. a Cayman)	
Island Corporation; STEVE VACHANI,)	
an individual; DOE 1, d/b/a)	
POWER.COM, DOES 2-25, inclusive,)	
)	San Francisco, California
Defendants.)	Monday
)	January 23, 2012

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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P R O C E E D I N G S

JANUARY 23, 2012

9:25 A.M.

THE CLERK: Calling case C 08-5780, Facebook versus Power Ventures.

Counsel, please approach and state your name for the record.

MR. FISHER: Good morning, Your Honor. Timothy Fisher for Defendants Power Ventures and Steve Vachani.

MR. CHATTERJEE: Good morning, Your Honor. Neel Chatterjee for Facebook. With me is Monte Cooper and Morvarid Metanat.

THE COURT: Good morning, all.

So these are cross motions. I didn't look to see who started the fight, but who wants to go first?

MR. FISHER: I will, Your Honor.

THE COURT: Very well.

MR. FISHER: I started it.

Your Honor, I'd like to begin by focusing on the e-mails that are at the center of the litigation. Facebook claims that my client sent 60,000 e-mails as part of the e-mail invitation system that Facebook has.

And I'd really like to draw the Court's attention to the e-mail and look at the e-mail. They only put one e-mail into the record -- a little unusual in a CAN-SPAM Act case, but

1 they put one e-mail in excerpted into their brief. And I'd
2 like to draw the Court's attention to several parts of that
3 e-mail, which I think really go to the heart of the matter.

4 First, if the Court looks -- and I have a copy of the
5 e-mail if Your Honor would like to have it in front of you.

6 **THE COURT:** I'd like to have the one you're referring
7 to, because I thought that I also had a facsimile or an actual
8 one in the pleadings.

9 **MR. FISHER:** If Your Honor looks at the "from" line
10 of the e-mail, it says the e-mail is from Facebook. Then the
11 e-mail address that follows says "eventmaster," and then
12 there's a series of numbers and letters. And then the e-mail
13 there is Facebookmail.com.

14 Then at the bottom of the e-mail, it says, "Thanks,
15 the Facebook team." And then below that, "Want to control
16 which e-mails you receive from Facebook?" And there's a link.
17 And those are all aspects of the e-mail that are controlled by
18 Facebook.

19 Neither Power nor any of the users could change any
20 aspect of this e-mail. Those are things that they could not
21 have adjusted in any way had they wanted to.

22 And I think it's very difficult to find liability
23 under the CAN-SPAM Act for having false and misleading headers
24 and subject lines when you can't even change them in any way.

25 **THE COURT:** I'm sorry? Why does that follow?

1 **MR. FISHER:** The CAN-SPAM Act requires that Facebook
2 prove that there were false and misleading headers and other
3 information in the e-mail.

4 **THE COURT:** Right. Is your argument that if the
5 e-mail is initiated from someone other than Facebook, the fact
6 that Facebook's name appears in the header cannot serve as a
7 basis for liability even if Facebook did not initiate the
8 e-mail?

9 **MR. FISHER:** It seems to me, Your Honor, there
10 shouldn't be liability under the CAN-SPAM Act for including
11 false and misleading headers and information if you don't have
12 any control over that information itself.

13 **THE COURT:** What do you mean by "control"?

14 **MR. FISHER:** That I couldn't put what supposedly
15 would be the correct information into that e-mail. How can I
16 possibly comply with the law if I have no control over what
17 goes into the e-mail?

18 **THE COURT:** You have control over whether the e-mail
19 is sent.

20 **MR. FISHER:** Actually not. Facebook designed its
21 system so that the e-mails were sent no matter what. Power nor
22 its users could not stop those e-mails from being sent when
23 they created an event on a Facebook website.

24 **THE COURT:** So I'm now coming closer to
25 understanding. In other words, Power did not create this

1 Facebook event, it only did something other than that. And so
2 by Facebook appearing here, it is appearing based upon no
3 conduct by Power.

4 **MR. FISHER:** That is exactly my argument, Your Honor.

5 **THE COURT:** So who initiated the e-mail?

6 **MR. FISHER:** Facebook initiated the e-mail, Your
7 Honor.

8 **THE COURT:** I see. So Facebook was sending this out?

9 **MR. FISHER:** Yes, it came from Facebook's server.

10 **THE COURT:** No, Facebook, the company. Not the
11 server. The server doesn't do anything unless it's instructed
12 to. So some individual at Facebook initiated this, is your
13 argument?

14 **MR. FISHER:** Well, I don't think there's somebody --
15 I mean, I think hundreds of millions of these kinds of e-mails
16 go out. Every time somebody creates an event on Facebook,
17 these e-mails go out. It is an automated --

18 **THE COURT:** I understand. So the someone who created
19 the event was a Facebook employee.

20 **MR. FISHER:** The person who created the event was a
21 user of the Facebook system.

22 **THE COURT:** So it wasn't a Facebook -- Facebook
23 didn't initiate it, some user initiated.

24 **MR. FISHER:** A user would initiate the e-mail. The
25 e-mail would not go without the user initiating an event.

1 **THE COURT:** And Power was not the user.

2 **MR. FISHER:** No, no, Power is not a user.

3 **THE COURT:** Power didn't initiate this event?

4 **MR. FISHER:** That's right.

5 **THE COURT:** All right. Let me -- to me, that would
6 be the end of the argument, because the statute requires
7 initiation. And your argument is there's no initiation.

8 **MR. FISHER:** That's right. That's the heart of our
9 argument.

10 **THE COURT:** All right. So let me interrupt your
11 argument and go to your opponent to respond to that.

12 **MR. FISHER:** Sure, Your Honor.

13 **MR. CHATTERJEE:** Your Honor, if I may address your
14 questions, I think there's a little bit of confusion in my
15 opposing counsel's argument.

16 You'll notice in page 7, which he gave you as a
17 demonstrative exhibit, the first complete sentence says,
18 "Defendant's PowerScript's software also initiated and sent an
19 additional electronic message to the Facebook user's friends."

20 And they want to and have consistently focused on the
21 e-mail that is sent as a consequence of posting an event on the
22 Facebook system.

23 But on page 6 of our brief, we actually talk in
24 detail about the fact that the PowerScript software, that was
25 created by Power.com, actually created the event and the text

1 for the event that was posted on the Facebook system and sent
2 to other Facebook users was actually drafted by Power.

3 And we actually give the direct quote of what is
4 posted on the Facebook event. It's like a calendar invite on
5 the Facebook system. That was the first message. The e-mail
6 message was the consequence of posting that event message.

7 Now, what my opposing counsel wants to do is they
8 want to redefine what "initiate" means under the CAN-SPAM Act.
9 "Initiate," as defined by the statute, includes procurement of
10 messages. And what Power did was they paid their users -- and
11 we submitted evidence on this from the 30(b)(6) testimony of
12 Mr. Vachani on behalf of Power Friday evening. We had just
13 recently deposed him so we couldn't submit it earlier.

14 They paid their users in order to gain access to
15 those users' accounts and send Power's commercial e-mail
16 messages to try and recruit people to the Power website.

17 **THE COURT:** Did you miss a step? Because, as I
18 understood your opponent's argument, they might have paid the
19 users, but what they paid the users to do was to have the users
20 initiate.

21 So what I heard from you just now was they paid the
22 users for access and Power initiated. Which is it?

23 **MR. CHATTERJEE:** It is Power that initiated it, Your
24 Honor. The declaration --

25 **THE COURT:** No, no. I gave you two choices. So one

1 would be to pay the users to initiate. The other would be
2 to -- I'm not sure how the pay gets involved in that, but for
3 Power to initiate. So I was trying to understand which you
4 were arguing.

5 **MR. CHATTERJEE:** Correct. Yes, Your Honor. So I am
6 arguing that Power initiated the message under the statutory
7 definition of the term "initiate."

8 When Power says to their users, we will pay you -- in
9 other words, we will procure your services to send our e-mail
10 message or our commercial message, like a Facebook
11 invitation --

12 **THE COURT:** So it is the first? In other words, they
13 procure the services of the user; namely, they pay the users to
14 send -- to create the event and use the Facebook software to
15 send the invite?

16 **MR. CHATTERJEE:** It's a little more complicated than
17 that, Your Honor. Power wrote software. That software would
18 log in to Facebook through a user account. That software would
19 then send an event invitation. And this was all done by Power.

20 All Power did with respect to the Facebook user is
21 they said, Can we use your user account to do that? And we
22 will pay you to send these event invitations.

23 And this is all detailed in the declaration of the
24 Larry Melling, who analyzed the source code, the only evidence
25 in this case about how that software works.

1 But Power is the entity that caused the event
2 invitations to be sent through Facebook user accounts. And
3 they paid their users for the right to send those event
4 invitations.

5 **THE COURT:** Now, let me pause.

6 Is there anything that Mr. Chatterjee just said to
7 which you would say that's incorrect?

8 **MR. FISHER:** Yes, I would say --

9 **THE COURT:** What exactly?

10 **MR. FISHER:** -- the procurement theory, Your Honor,
11 is a complete red herring.

12 **THE COURT:** No, no. What did he say that's
13 incorrect?

14 **MR. FISHER:** I'm sorry, I couldn't -- I was focused
15 on his argument about procuring the --

16 **THE COURT:** What did he say that was incorrect? What
17 fact did he say that was -- I'm trying to get to how --

18 **MR. FISHER:** That Power initiated these e-mails is
19 certainly --

20 **THE COURT:** That was his conclusion. What fact -- I
21 was told that Power wrote the software. That was a fact.
22 That's something --

23 **MR. FISHER:** Power created a browser through which
24 one could access the Facebook website.

25 **THE COURT:** Did it write software, yes or no?

1 **MR. FISHER:** Absolutely.

2 **THE COURT:** All right. And did the software allow
3 them to log in through the user account?

4 **MR. FISHER:** Through a Facebook user account, yes.
5 It allowed users to access the Facebook website.

6 **THE COURT:** All right. And then using that software,
7 did Power send an event --

8 **MR. FISHER:** No.

9 **THE COURT:** -- invitation? All right.
10 So what about that is incorrect?

11 **MR. FISHER:** Power would send -- Power users would
12 send the event invitation.

13 **THE COURT:** So what does that mean factually, that
14 the Power users would send?

15 In other words, individual users would log on to
16 their computer and create the event, or was there some
17 automated process by which the software that was created would
18 mimic the user doing it and it would be sent?

19 Was this a series of people doing it or something
20 that was set up through the computer?

21 **MR. FISHER:** Each individual user had to authorize
22 the creation of an event. And there was code in the software
23 that allowed the user to click some buttons and to create an
24 event.

25 **THE COURT:** All right.

1 **MR. FISHER:** But it was all done with the permission
2 of the user.

3 **THE COURT:** Let me go back over here. So do you
4 disagree with that, that the way it operate factually is that
5 Power created the software, but each individual user had to go
6 into the system to create individual events?

7 **MR. CHATTERJEE:** No, that's not true, Your Honor.

8 **THE COURT:** Okay.

9 **MR. CHATTERJEE:** And there's no evidence, absolutely
10 none, that they submitted that said that.

11 **THE COURT:** All right. So how do I decide a motion
12 for summary judgment? I thought these were cross motions to
13 which there was no disagreement over the facts. So I'm trying
14 to figure out how it operates.

15 **MR. FISHER:** Your Honor --

16 **MR. CHATTERJEE:** Your Honor, it's very simple. In
17 the evidence we submitted Friday, Mr. Vachani, in the 30(b)(6)
18 deposition, said the software is the best evidence of how the
19 system work.

20 Larry Melling, who is our expert, came in and put
21 forward affirmative evidence describing how that software
22 worked, going line by line through the sub routines on that
23 code that described how Power did it in the exact way I
24 described it to you. The evidence is unrefuted, so there is no
25 issue of fact.

1 They can come in here now and say they disagree with
2 that, but there is no evidence, none, that says the software
3 operated any differently than the way Mr. Melling articulated.

4 **THE COURT:** All right. Let me pause. So what would
5 be the fact that would contradict that?

6 **MR. FISHER:** The fact -- there is not a fact that
7 contradicts that. I think we're in agreement about how it
8 works. There's no dispute that there was a process by which
9 Power users could create these events. But they were done with
10 the explicit permission of the Power users. It could not be
11 done without the Power users authorizing.

12 Your Honor, we included in our brief screen shots
13 that showed exactly how the system worked. And I think if the
14 Court looks at those, it's very basic and very simple --

15 **THE COURT:** Why doesn't Power show up at all in the
16 event e-mail?

17 **MR. FISHER:** I think Power does, Your Honor.

18 **THE COURT:** Where?

19 **MR. FISHER:** It says the host is Power.

20 **THE COURT:** Where?

21 **MR. FISHER:** Right in the middle of the e-mail, it
22 says, Host: Power.

23 **THE COURT:** Oh. So that is supposed to be Power.com?

24 **MR. FISHER:** Yes, I believe so, Your Honor.

25 **THE COURT:** That's the only reference to Power in

1 this?

2 **MR. FISHER:** Yes. I believe if you click on the --

3 **THE COURT:** So they are hosting the reunion, they're
4 not hosting the e-mail.

5 **MR. FISHER:** I don't know if they -- yes. I mean, I
6 think, Your Honor, if a user was to click on the link down
7 below the information about the event, that would lead you to
8 more information about Power. I don't know. And that's not in
9 evidence, Your Honor, but that's my speculation.

10 **THE COURT:** So why does it -- why is Facebook on this
11 at all?

12 **MR. FISHER:** I have no earthly idea, is the answer to
13 that, Your Honor.

14 **THE COURT:** Say again?

15 **MR. FISHER:** I have no earthly idea why Facebook
16 cares about this.

17 **THE COURT:** No, no, no, I didn't ask you why they
18 care about it. Why does Facebook appear in the event?

19 Why isn't this a Power event where Power is
20 soliciting its users? Because you said these are Power users.
21 So these are Power users, also who are Facebook users, sending
22 out an event that is to the benefit of Power, correct?

23 **MR. FISHER:** That's correct, Your Honor.

24 **THE COURT:** All right. So why does Facebook appear
25 in it at all?

1 **MR. FISHER:** The answer to that is because that's how
2 Facebook designed the system. Facebook created this system by
3 which e-mails go out, and they designed it down to the -- every
4 aspect of that was created by Facebook, not Power.

5 **THE COURT:** The alternative would be for Power to
6 create its own e-mail list and send it directly, correct?

7 **MR. FISHER:** They could have done that.

8 **THE COURT:** All right. So what it chooses to do is
9 to use the Facebook system for its benefit. Power chooses to
10 use the Facebook system for its benefit.

11 **MR. FISHER:** There was no way for Power to create its
12 own e-mail invitations within the Facebook --

13 **THE COURT:** Why not? You had the users, and the
14 users had the e-mail addresses of their friends. Why couldn't
15 they simply list those?

16 **MR. FISHER:** Because Facebook is a closed system that
17 doesn't allow its users to use its system in that manner.

18 **THE COURT:** I didn't say use its system. You want to
19 get to the e-mail address of the friends. The users know their
20 friends. They know their e-mail address. Why can't they
21 simply give them to Power?

22 **MR. FISHER:** They could have done that. They didn't
23 do that, Your Honor.

24 **THE COURT:** No --

25 **MR. FISHER:** Facebook has a system that is created

1 for creating events, and it's a very simple process by which
2 one, with a few clicks on a keyboard, could send out these
3 kinds of invitations. It's very common. And hundreds of
4 millions of these are sent every day, whether it's somebody
5 who's having a party or somebody who has a business function
6 that is at issue.

7 Facebook is obviously so ubiquitous --

8 **THE COURT:** All right. Let me have you go back to
9 your argument. I appreciate that I know almost enough about
10 the facts. I did not hear you say that I could not rely on
11 this expert declaration as an explanation of how the system
12 operates.

13 And the question that it sounds like you need to
14 argue to the Court is, if it operates like that, does it
15 violate the statutes that are at issue here.

16 **MR. FISHER:** Sure, and I'm happy to address that,
17 Your Honor.

18 **MR. CHATTERJEE:** And, Your Honor, just to make sure
19 I've pointed you in the right direction, the Melling
20 declaration, paragraphs 3 and 17 to 35, describe in detail how
21 the event invitations work.

22 **THE COURT:** All right. So let's assume that -- and I
23 presume you are familiar with that declaration. And so in
24 order to make this a purposeful argument under the standard for
25 summary judgment, I need to now go to statutory interpretation,

1 which is a matter of law.

2 And assuming that you agree with paragraphs 3 and 17
3 to 35, why doesn't that violate the federal and state laws that
4 are at issue here?

5 **MR. FISHER:** Because, first of all, Power didn't do
6 anything. It was Power users who did something and authorized
7 the e-mails to be sent. And really -- really, there are two
8 steps here, Your Honor.

9 First, there's the creation of an event. And I don't
10 think the creation of an event even falls with the CAN-SPAM
11 Act. The e-mail is a separate part, and that's done completely
12 by Facebook.

13 And they have no control whatsoever what goes into
14 many aspects of this e-mail. The return address, the name on
15 it, the signature line, the opt-out information at the bottom
16 of the e-mail; they have no control over it that.

17 And I don't think under CAN-SPAM -- they haven't
18 cited a single case under similar facts where a defendant has
19 been found liable under the CAN-SPAM Act.

20 Furthermore, Your Honor, there has been no showing
21 that anyone who got these e-mails was deceived or misled or
22 complained or was in any way harmed by receiving these e-mails.
23 They haven't put into evidence anything that shows that
24 somebody said, hey, Facebook, stop sending me these e-mails.

25 **THE COURT:** Well, I don't know that the statute

1 requires that. In other words, you would argue that the
2 statute, by the language of the statute, requires actual belief
3 or some mental state on the part of the people who receive it.
4 I don't see that.

5 **MR. FISHER:** No, but I think, Your Honor, that goes
6 to the point that it's telling that -- the fact that nobody
7 complained shows that people get these things all the time and
8 they know they're coming from Facebook and they're part of the
9 Facebook system.

10 **THE COURT:** I invited you to focus on the statute.
11 If you tell me, Your Honor, the statute is important, that the
12 CAN-SPAM Act doesn't apply if it's a ubiquitous thing. I don't
13 see that language, so that's why I'm inviting you to go to --
14 in other words, I see "initiate."

15 I see something where there's something called header
16 information as the source, destination, routing information.

17 Tell me that the source, destination and routing
18 information is not inaccurate in any way. That's what I want
19 to hear. I want to hear you argue to the language of the
20 statute and based upon the facts as set forth in the
21 declaration.

22 **MR. FISHER:** I don't think there's a disagreement
23 about what the statute says, Your Honor. I think the
24 disagreement here is on a couple things. I don't think there's
25 any inaccuracy in these -- in the header information. And

1 there's nothing wrong with what is in the header information,
2 and there's no violation therefore.

3 **THE COURT:** What's the source?

4 **MR. FISHER:** The source?

5 **THE COURT:** What does that mean, the source?

6 **MR. FISHER:** The source of the e-mail?

7 **THE COURT:** The source as identified in the header
8 information.

9 **MR. FISHER:** The source is the Facebook server. The
10 source is Facebook.

11 **THE COURT:** And so if anyone were to send something
12 through the Facebook server, the Facebook server becomes the
13 source as opposed to the person who initiates it. The source
14 is always defined as the Internet service provider, the server,
15 the Internet service provider. That's what I should say as a
16 matter of law.

17 **MR. FISHER:** It's common sense, I think, Your Honor.

18 **THE COURT:** No. Just say yes, if that's what your
19 argument is.

20 **MR. FISHER:** Yes.

21 **THE COURT:** Because I'm going to tie you to arguments
22 of proposition. Because if this is a motion for summary
23 judgment, the people who grade my papers are going to be
24 looking to see that I'm basing it on no dispute about facts but
25 only questions of law.

1 And if you tell me that, under the statute, the
2 source means the server, that's what I'll write down. That's
3 as your position.

4 **MR. FISHER:** That's my position, Your Honor.

5 **THE COURT:** All right. And...

6 **MR. FISHER:** Or, more generally, the source is
7 Facebook.

8 **THE COURT:** And then the Act further provides that
9 the header information shall be considered materially
10 misleading if it fails to identify accurately a protected
11 computer used to initiate the message.

12 **MR. FISHER:** And that really goes to the argument I
13 made earlier, Your Honor, that nobody was misled. How can it
14 be materially misleading if nobody complained, nobody said,
15 Hey, Facebook, stop sending me this. There's no evidence of
16 that.

17 **THE COURT:** Well, it says "fails to identify the
18 protected computer used to initiate the message."

19 What protected computer was correctly identified as
20 used to initiate the message?

21 **MR. FISHER:** Facebook's computer sent a message,
22 Facebook's server.

23 **THE COURT:** Used to initiate the message.

24 **MR. FISHER:** Yes.

25 **THE COURT:** All right. And so, again, the language

1 "used to initiate the message" always means the server of the
2 Internet service provider.

3 **MR. FISHER:** Yes.

4 **THE COURT:** All right.

5 **MR. FISHER:** The other thing the statute requires,
6 Your Honor, is harm. And there is no evidence whatsoever of
7 any harm to Facebook under either the CAN-SPAM Act or the two
8 other statutes, the Computer Fraud and Abuse Act or Penal Code
9 Section 502, that they also assert in their complaint.

10 The only evidence that Facebook has put in of harm is
11 two declarations.

12 **THE COURT:** So you've gone to harm. I'm still on the
13 definition of "initiate."

14 So then the other part is, under the statute, "would
15 impair the ability of an Internet service provider or a
16 recipient to identify, locate or respond to a person who
17 initiated the message."

18 So respond to the person who initiated, who would
19 that be under your argument?

20 **MR. FISHER:** Doesn't the last line of the e-mail,
21 "Want to control which e-mails you receive from Facebook?" go
22 directly to that, Your Honor?

23 **THE COURT:** I don't want to answer the questions. I
24 want you to answer my question.

25 Who would you argue is the individual that is

1 referred to as "respond to a person who initiated the
2 electronic mail"? Who is that referring to under the statutory
3 language?

4 **MR. FISHER:** You would respond to Facebook.

5 **THE COURT:** Well, I need a more general -- all other
6 cases Facebook might not be in it. I'm trying to ask you a
7 statutory interpretation question.

8 Is that again to the server?

9 **MR. FISHER:** Yes.

10 **THE COURT:** Of the Internet service provider?

11 **MR. FISHER:** Yes.

12 **THE COURT:** All right.

13 **MR. FISHER:** Is it all right if I move on to harm,
14 Your Honor?

15 **THE COURT:** Well, I was going to go to the California
16 Penal Code, also involved here.

17 **MR. FISHER:** My arguments on harm tie into both the
18 other statutes as well.

19 **THE COURT:** And what's your position with respect to
20 California Penal Code Section 502?

21 **MR. FISHER:** 502 and the Computer Fraud and Abuse Act
22 are similar in terms of their scope and what they cover. They
23 both require some showing that there was some sort of taking of
24 information from an unauthorized access.

25 We've already talked at some length that there was no

1 unauthorized access here. Any access was done with the
2 permission of Power users who expressly provided their log-in
3 credentials.

4 In addition, there's no evidence of any sort of
5 taking at all. The only information that Power ever took from
6 Facebook was information that did not belong to Facebook. It
7 was Power users' personal information, their pictures, their
8 music, their contacts, things like that that users said they
9 could take. There's no evidence whatsoever of anything having
10 been taken from Facebook. No software --

11 **THE COURT:** Well, the software that was created, why
12 was it necessary?

13 **MR. FISHER:** Why was the software that was created
14 necessary?

15 **THE COURT:** Why was the Power software necessary?

16 **MR. FISHER:** The Power software was designed to allow
17 users who have multiple social networking accounts to look at
18 them all in one place.

19 So if a user had an account with Orchid, which is
20 Google's social networking system, as well as a Facebook
21 account and a Twitter account and all these other ones, they
22 could go to Power and they could access those accounts all in
23 one place and then share information between the various sites
24 all in one place. That was what --

25 **THE COURT:** All right. But was there any feature of

1 the software that was necessary to circumvent protections that
2 Facebook built against that?

3 **MR. FISHER:** Was there -- I'm sorry, Your Honor.
4 Would you rephrase that for me? I didn't understand.

5 **THE COURT:** Was there any aspect of the Power
6 software that was created to circumvent protections built into
7 the Facebook system to avoid that very process?

8 **MR. FISHER:** Power's software had built into it the
9 capacity to switch from one IP address to another one if an IP
10 address were --

11 **THE COURT:** My question called for a yes or no
12 answer. Was there any aspect of the Power software that was
13 designed to circumvent Facebook's software or its system to
14 avoid this process that you're describing that Power created,
15 yes or no?

16 **MR. FISHER:** No, Your Honor.

17 **THE COURT:** No. So there was no -- there was no
18 aspect of this that was circumventing technical or barriers
19 that were built into the code by Facebook, yes?

20 **MR. FISHER:** It had the -- yes, Your Honor. It had
21 the ability to switch from one IP address to another, but that
22 is not -- there's not evidence that that is -- that the purpose
23 was to --

24 **THE COURT:** I didn't ask the purpose. I asked
25 whether it circumvented.

1 **MR. FISHER:** No, it was not designed to circumvent.

2 **THE COURT:** Did it circumvent?

3 **MR. FISHER:** As defined by this Court, I don't
4 believe so, no.

5 **THE COURT:** So I've got to take your belief?

6 **MR. FISHER:** No, Your Honor.

7 **THE COURT:** So how do I learn whether or not --
8 what's the test for whether it circumvented?

9 **MR. FISHER:** Your Honor looked at this issue at some
10 length in 2010, in connection with earlier motions that were
11 brought by the parties.

12 **THE COURT:** So I can use that same process.

13 **MR. FISHER:** Yes, I think you would use exactly the
14 same process. And I think when Your Honor talked about
15 circumventing in the -- I believe it was July 2010 order, Your
16 Honor talked about circumventing in, okay, Facebook, if you
17 attempted to block Power and then they did something to get
18 around your block, okay, that can be a violation of the CFAA or
19 502. I think that's what Your Honor intended by that.

20 **THE COURT:** I wanted more information at that point.

21 **MR. FISHER:** Yeah. And at that time Facebook's
22 argument was that we're going to show you, Your Honor, that we
23 put up an IP block and then Power did something to get around
24 that.

25 They've now abandoned that theory, and now their

1 theory is, well, when Power was designing its software,
2 whenever that was -- 2006, 2007 -- that at that time they built
3 into their software something that could get around some sort
4 of hypothetical IP blocking that came up at some future time,
5 some technical barrier that they had not even yet encountered.
6 That's their argument now.

7 **THE COURT:** Maybe you're being adversarial in this.
8 I understood that there were built into this Power software
9 some switching of the IP address so that any attempt that could
10 be made to stop massive kinds of e-mails coming through
11 Facebook would be circumvented.

12 Maybe I'm not accurately describing it, but that's
13 what I'm trying to get you to speak to.

14 **MR. FISHER:** It's -- the software had that ability to
15 switch IP addresses.

16 **THE COURT:** Isn't that designed to circumvent?

17 **MR. FISHER:** That is not a design to -- I don't think
18 there's any evidence that that was designed to circumvent.

19 **THE COURT:** Does it circumvent?

20 **MR. FISHER:** Just as we -- you know, your Honor, I
21 think that's a very common feature of software, so that if you
22 go to a website and it doesn't connect, the website is able to
23 switch over to another IP so that you're still able to connect.
24 I think that's something we all encounter every day when we use
25 software.

1 **THE COURT:** How about if you're trying to block?

2 **MR. FISHER:** How could Power have known in advance
3 that Facebook was going to attempt to block it and what
4 mechanism they would use?

5 **THE COURT:** Maybe these are rhetorical questions, but
6 I don't intend to answer that.

7 I'm trying to get your position as to whether or not
8 that formed circumvention if you switched IP addresses in order
9 to avoid blocking a particular one.

10 **MR. FISHER:** It certainly had the effect of getting
11 around the block, but the block was very weak.

12 And I don't think Your Honor wants to create a system
13 where someone who's writing a piece of software and then five
14 years later somebody tries to block the use of that software
15 and suddenly that becomes criminal liability under the Computer
16 Fraud and Abuse Act.

17 In the amicus brief submitted by the Electronic
18 Frontier Foundation, they talked about that sort of creating a
19 thought crime, that they talked about it as a way in which
20 somebody who's, you know, in their office right now writing a
21 piece of software has to anticipate what blocks are going to be
22 used and then worry about whether or not they're going to
23 someday be held liable under this statute even though they have
24 no idea how that software is going to be used or what kind of
25 blocks a company could use. There is no way a person could

1 know that. And to impose liability for that just seems
2 inconsistent with the Act.

3 And the Electronic Frontier Foundation has very
4 persuasive arguments on that point, and I'd ask Your Honor to
5 look at those.

6 On the harm issue, Your Honor, the evidence of harm
7 that's been put in by Facebook consists of two declarations.
8 One by somebody on the Facebook security team named Ryan
9 McGeehan. And he talks about that what Power and its users did
10 created security vulnerabilities in the Facebook system, and he
11 talks about that their actions harmed -- potentially harmed
12 Facebook's goodwill. I think that's all very vague and
13 unquantifiable and not very specific.

14 And the extent of what Mr. McGeehan says that he and
15 his team did was they had some meetings. And I don't think
16 those harms are sufficient for a finding of liability or a
17 recovery of any sort of damages under the CAN-SPAM Act, under
18 the CFAA, or under Penal Code Section 502. And certainly not
19 the \$18 million that Facebook seeks under the CAN-SPAM Act.

20 The other harm identified by Facebook is it seeks to
21 recover its lawyer fees. Its lawyer, Joseph Cutler, wrote a
22 cease-and-desist letter to Power and then initiated this
23 lawsuit. And they now seek to recover those fees as part of
24 this lawsuit.

25 And, again, I think that's inconsistent with the

1 language of the CAN-SPAM Act and the case law that's
2 interpreted the Act, which talks about the ability to recover
3 under the Act for operational and technical costs that were
4 incurred as a result of the violation of the statute.

5 They haven't cited a case under the CAN-SPAM Act
6 where there is any sort of recovery of attorneys' fees for a
7 violation of the Act.

8 The CFAA and 502 are broader in their language about
9 what can be recovered -- I see I have a red light. May I
10 continue, Your Honor?

11 **THE COURT:** Finish your statement there.

12 **MR. FISHER:** Sure. The CFAA and 502 are broader in
13 their language regarding the costs that can be recovered, but
14 if you look at the legislative history -- and, again, the
15 Electronic Frontier Foundation's brief looked at it carefully
16 and showed, really, again, the purpose of those statutes is to
17 recover for things like repair costs, restoring data,
18 reprogramming a computer, lost computer time, those sorts of
19 things. There's not really any sort of mechanism for
20 recovering attorneys' fees under that statute.

21 And it also allows a plaintiff to sort of manufacture
22 standing under the statute because it's very easy to run up
23 \$5,000 in attorney time and a plaintiff who didn't like
24 somebody's access could simply hire a lawyer and in a few hours
25 they would have standing to assert a claim under the statute.

1 Thank you, Your Honor.

2 **THE COURT:** Thank you, Counsel.

3 So although we have an earlier colloquy, I give to
4 you the same responsibility. Assuming that what is described
5 in the declaration you refer to, I can take that as undisputed
6 facts. What brings that conduct within the various statutes?

7 **MR. CHATTERJEE:** Well, Your Honor, Mr. Melling's
8 declaration does actually say that it was Power that initiated
9 these commercial messages.

10 **THE COURT:** Those are his conclusions. The facts are
11 not his conclusion. The facts are what actually happened. And
12 so I'll have to separate out the conclusion from the factual
13 description of what took place.

14 **MR. CHATTERJEE:** Understood, Your Honor.

15 So, Your Honor, you asked some very pointed questions
16 on the CAN-SPAM Act about who is the initiator. And the way I
17 like to think about the "who is the initiator" question is if I
18 wanted to ask someone to stop sending me this particular form
19 of commercial message, could I do that?

20 In this case, Power was paying users to send
21 commercial messages. Just as Your Honor asked, they were not
22 doing it on their own behalf. Instead, they were hiding behind
23 the users to send these messages.

24 When another user received those messages, there was
25 no way for them to know -- and Your Honor actually asked

1 specific questions about those e-mail messages. And you can
2 also look at the event invitations. There was no way to know
3 that it originated with Power.

4 So if a user said, look, I don't want to see anymore
5 Power messages, they would have no way to know who to contact
6 to say, please, stop doing that.

7 **THE COURT:** Well, you're using "user" in both ways.
8 So if a recipient wanted to --

9 **MR. CHATTERJEE:** Let's use "sender" and "recipient."
10 That's a better way to refer to it, Your Honor.

11 So if a recipient of a message that was originated
12 from the Power website, using the Power technology, wanted to
13 tell Power to stop, they could not do that.

14 **THE COURT:** Who is the statute designed to protect?

15 **MR. CHATTERJEE:** The statute is defined to protect
16 both Internet services that could be misused in the way Power
17 misused the Facebook website as well as the recipient of the
18 e-mail messages.

19 But the standing that's conferred is specifically on
20 the ISPs to incentivize them to protect themselves, because it
21 requires that adversely affected language for the ISPs. But it
22 is designed to prevent misuse of systems such as Facebook in
23 the way that Power did it.

24 **THE COURT:** So if the ISP is the intended beneficiary
25 of the statute -- I understand that senders and recipients will

1 be affected, but the only standing here is given to the ISP.

2 **MR. CHATTERJEE:** Correct, Your Honor.

3 **THE COURT:** All right. So if the ISP creates a
4 system of hosting events and allows users to use the system to
5 host those events, what is to prevent a user from being paid to
6 host an event?

7 **MR. CHATTERJEE:** Your Honor, it's because the
8 statute, the CAN-SPAM statute -- there's two creatures. One is
9 the terms of service which governs the relationship between a
10 website and its users. But there's also the statute itself
11 under CAN-SPAM. And if I may, I'll read you the definition of
12 "initiate."

13 **THE COURT:** All right.

14 **MR. CHATTERJEE:** So what the definition of "initiate"
15 says is, the term "initiate," when used with respect to
16 commercial electronic mail message, means to originate or
17 transmit such message, or to procure the origination or
18 transmission of such message. That's the definition.

19 And what -- what Power did here is they paid their
20 users. They procured the origination of the message from their
21 users.

22 **THE COURT:** So it's really the latter part that I
23 should focus on. In other words, my question was: What is to
24 prevent a user from being paid to initiate these invites? And
25 you believe that language does that?

1 **MR. CHATTERJEE:** That language requires that if
2 you're going to pay the users to send a commercial e-mail
3 message for you, you have to identify that you're the actual
4 sender of the message. So with respect to the event --

5 **THE COURT:** Not the actual sender, you're the
6 procurer. I guess it mixes both things. In other words, if
7 there are two standards, sending and procuring someone else to
8 send, what does the statute say if you're using the latter
9 portion?

10 **MR. CHATTERJEE:** That's right, Your Honor. So under
11 the statute both the sender and the procurer are the initiators
12 of a commercial message.

13 **THE COURT:** I thought it was "or."

14 **MR. CHATTERJEE:** It is. It is "or."

15 **THE COURT:** So if you're in an "or" situation where
16 you've got just the person who's procuring someone else to send
17 it, what does the statute provide with respect to
18 identification?

19 **MR. CHATTERJEE:** So what the statute provides is that
20 the -- the message that is sent has to identify who is the
21 procurer. So in this case, if an event invitation --

22 **THE COURT:** That literal language isn't there.
23 That's something you'd ask me to interpret from the statute.

24 **MR. CHATTERJEE:** It is the way that the FTC has
25 interpreted the statute. It is the way that the courts have

1 interpreted the statute. And my reading of the statute, that's
2 what's required, Your Honor.

3 **THE COURT:** All right.

4 **MR. CHATTERJEE:** Because, otherwise, the statute
5 would have no teeth. If a noncommercial entity could be bought
6 off to send a message, you would never be able to go to the
7 source of the problem and stop the message.

8 The whole point here is to be able to go to the
9 source of the commercial e-mail messages and get them to stop,
10 either from the ISP side, or if a user received an unsolicited
11 message, they need to be able to contact the originator.

12 **THE COURT:** Well, your opponent points to the word
13 "Power" under host as the way you would know who was doing
14 this. Why isn't that sufficient?

15 **MR. CHATTERJEE:** Because it doesn't even identify a
16 website in the e-mail. It just says Power. If I received an
17 e-mail invitation and all it said was Power, I'd have no idea
18 who that was, where it was, whether that was the source or not.
19 It has no indication as to what that is. It just uses the
20 naked word "Power." It doesn't even say Power.com.

21 The key issue when you're talking about these
22 commercial e-mail messages is to be able to know who the source
23 of the message is, the person that's actually causing it to be
24 sent, and that includes the person procuring the message, and
25 to tell them to stop.

1 This e-mail message, as well as the event invitation
2 that's posted on the Facebook system, gave no indication as to
3 who the source of the message was, Power.com.

4 **THE COURT:** So here's the -- here's the other aspect
5 of this that concerns the Court, and that is, this is not
6 unconnected to the users. This is an attempt by one commercial
7 company to compete with another by inviting the users to use
8 the resources of their many websites, their many social
9 networking sites, to its advantage.

10 And it, therefore, is very different from Power
11 somehow sending directly to various users of Facebook and
12 MySpace or others -- I don't know quite the number that would
13 be involved here -- because, using the intermediary of a user,
14 you at least then don't have a uncontrollable audience that
15 you're sending it to.

16 You're actually only sending it to people who the
17 user decides, I would like to have my friends receive the
18 benefit of this because I'm receiving a benefit, a hundred
19 bucks if I can win the time and number of contests. But that
20 removes it from other circumstances where it's totally
21 unconnected with the user. Address that concern.

22 **MR. CHATTERJEE:** Your Honor, actually that specific
23 type of issue has been addressed in case law as well. And it's
24 actually considered a worse issue because it falsely puts a
25 stamp of approval that it's the user sending it, not Power.

1 It creates a misleading impression on the part of
2 users because it doesn't say that the user is being paid to
3 send these. Instead, it kind of creates a degree of
4 association that otherwise wouldn't exist.

5 **THE COURT:** Well, are they being paid or are they in
6 a contest?

7 **MR. CHATTERJEE:** They are being paid. If they -- if
8 they get a hundred users --

9 **THE COURT:** That makes it a contest, doesn't it?

10 **MR. CHATTERJEE:** Your Honor, if you look at the FTC
11 analysis of the CAN-SPAM Act, it's not a contest in the sense
12 that if people bring a hundred users, they get a hundred
13 dollars.

14 Even Mr. Vachani, in his 30(b)(6) deposition, which
15 we submitted on Friday, he said they were paying users to get
16 access to their user account and send these invitations. You
17 cannot say that that is anything other than procurement.

18 They are procuring the users by -- they're procuring
19 new members on Power by paying existing Power users to get
20 access to the Facebook account. That is -- that is exactly
21 what the statute says. That's how -- that's how it has been
22 interpreted by the FTC. That is how the case laws interpret
23 it.

24 And it gets aggravated by the fact that they created
25 a false degree of association by using the users. It is true

1 that there are other CAN-SPAM cases that you just have a
2 general, broadcast-based e-mail to everyone in the world. But
3 that does not change the nature of what the statute requires
4 and what creates a cause of action under the statute.

5 **THE COURT:** How about the harm?

6 **MR. CHATTERJEE:** Your Honor, as to the harm, they
7 admitted a number of things in their answer, including -- and
8 Your Honor found on our previous motion that we had put forward
9 the requisite amount of harm just by nature of their
10 admissions.

11 But we did put in additional evidence from Ryan
12 McGeehan that shows that we were adversely affected, as well as
13 the deposition of Joe Cutler, who is one of the lawyers that
14 was originally investigating Power's activities.

15 **THE COURT:** It adversely affected the measure of
16 harm?

17 **MR. CHATTERJEE:** So it's different, Your Honor, for
18 the CAN-SPAM Act than it is for 502C and 1030. Fundamentally,
19 I think the underlying facts are the same, but the way the
20 statutes read are slightly different.

21 Adversely affected -- and the *Gordon vs. Ruchu Mundo*
22 case, goes in detail about what that means under the CAN-SPAM
23 Act, but, basically, if we are engaging in substantial efforts
24 to combat spam, or unsolicited commercial messages, we have to
25 engage in investigatory efforts to stop this sort of activity.

1 That is enough to constitute adversely affected.

2 I think that the facts underlying that and harm, for
3 502C and CFAA are fundamentally the same. The statutes are
4 not -- are worded slightly differently, but the underlying
5 analysis doesn't change a whole lot.

6 **THE COURT:** All right. A final question for you. I
7 see your time is coming to an end. And I'll actually ask your
8 opponent the same question.

9 This feels to me as though, even if I were to be
10 persuaded to find on liability, I cannot find by way of summary
11 adjudication damages.

12 So if I were to find in your favor, what would be
13 undisputed evidence about whether I can come to a determination
14 of damages?

15 **MR. CHATTERJEE:** So, Your Honor, on the damages
16 question under the CAN-SPAM Act, we have put in unrefuted
17 evidence as to the number of event invitations that were sent
18 through the Facebook system. It was 60,000, a certain several
19 hundred beyond that.

20 The declaration of Larry Melling once again -- and
21 I'll keep pointing you back to that because they haven't
22 refuted it -- pointed to specific sub routines and databases
23 where -- the logging data of how many event invitations were
24 sent through the Power system.

25 During this litigation, the other side has destroyed

1 the database that would connect that information. And so the
2 evidence we have right now is 60,100-something. I forget the
3 exact number of hundreds.

4 What we ask Your Honor to do is, under the CAN-SPAM
5 Act, to just apply the statutory maximum and the aggravating
6 numbers because that is the only evidence there is. They
7 destroyed the rest. And so we know that there's more. We
8 believe there's more. But they destroyed that evidence.

9 As to the damages under the -- under the 502C and
10 1030 causes of action, Your Honor, if you're going to make a
11 finding of liability, that may or may not be necessary for
12 damages, because, quite honestly, if we get \$18 million under
13 the CAN-SPAM Act, my guess is we may never try the issue of
14 damages on the -- on the 502C and 1030 claims. The damage
15 numbers there are considerably smaller.

16 **THE COURT:** All right.

17 **MR. CHATTERJEE:** If I can just add one final thing --

18 **THE COURT:** Yes.

19 **MR. CHATTERJEE:** -- to address going back to the
20 Larry Melling declaration, you had a colloquy about the
21 circumvention measures. There is an exhibit, Exhibit 3 to my
22 declaration, where Mr. Vachani is asked specifically about the
23 blocking measures and their efforts to circumvent.

24 And he was asked, Did you actually circumvent
25 Facebook blocks? Generally.

1 Here's what he said:

2 "It means that it is very difficult to block
3 up. Facebook took what should have been a
4 standard measure, but we were able to easily
5 adjust and could have continued."

6 He admitted that he circumvented in reaction to the
7 Facebook measures, but we also know that he made a premeditated
8 act. The documents that we submitted show the reason that this
9 proxy-rotating technology was developed was to evade detection
10 and to avoid blocks.

11 And Mr. Melling's declaration describes in detail how
12 the system was engineered from the very beginning to do that,
13 because they knew that Facebook and other websites wouldn't
14 want to give them access. They knew that the terms of service
15 forbade it. And they knew after Facebook sent a
16 cease-and-desist letter that Facebook was going to block them.
17 And so they preengineered a proxy rotation strategy.

18 Mr. Fisher can come in here and say, well, in the
19 abstract, you know, people might pre-engineer something and it
20 might have some pernicious consequences. That is not what the
21 facts show here, Your Honor.

22 **THE COURT:** Very well. I have that in mind. Thank
23 you very much, Mr. Chatterjee.

24 **MR. CHATTERJEE:** Thank you, Your Honor.

25 **THE COURT:** So the question I put at the end there

1 that I would have you respond to is whether I shouldn't treat
2 these as cross motions for summary judgment on liability only.

3 Even if I find liability one way or the other here,
4 don't I need a trial on damages?

5 **MR. FISHER:** No, Your Honor, because I think we put
6 the evidence in, there's no harm. Facebook hasn't been harmed
7 in any way. And the Court doesn't -- the Court can decide
8 this.

9 **THE COURT:** Okay.

10 **MR. FISHER:** There's no harm.

11 **THE COURT:** Well, sounds like both sides are saying I
12 don't need a trial on damages, so I'll take your word for it.

13 Thank you very much. The matter is submitted.

14 **MR. FISHER:** Thank you, Your Honor.

15 **MR. CHATTERJEE:** Thank you.

16 (At 10:16 a.m. the proceedings were adjourned.)

17 - - - -

18 **CERTIFICATE OF REPORTER**

19 I certify that the foregoing is a correct transcript
20 from the record of proceedings in the above-entitled matter.

21 DATE: Friday, January 27, 2012

22 s/b Katherine Powell Sullivan

23 _____
24 Katherine Powell Sullivan, CSR #5812, RPR, CRR
25 U.S. Court Reporter